United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7497

To be argued by
DAVID SCHOENBROD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7497

FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT, INC., ENVIRONMENTAL ACTION COALITION, INC., HARLEM VALLEY TRANSPORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COUNCIL, NORTH EAST TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE, PAUL DUBRUL,

Plaintiffs-Appellants,

—v.—

HUGH CAREY, ABRAHAM BEAME, DAVID L. YUNICH, MICHAEL J. COBB, ALFRED EISENPREIS, MOSES L. KOVE, ELINOR GUGGENHEIMER, ROBERT A. LOW, MICHAEL LAZAR, JOHN ZUCCOTTI, MORRIS TARSHIS, PAUL O'DWYER, J. DOUGLAS CARROLL, JR., WILLIAM J. RONAN, THEODORE KARAGHEUZOFF, P.E., JAMES MELTON, OGDEN REID, STATE OF NEW YORK, CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

ROSS SANDLER
DAVID SCHOENBROD
Attorneys for Plaintiffs-Appellants
Natural Resources Defense Council, Inc.
Office & P. O. Address
15 West 44th Street
New York, New York 10036
(212) 869-0150

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Defendants-Appellees.

BRIEF FOR PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

Friends of the Earth, Natural Resources Defense Council, Inc., and others (hereinafter "Plaintiffs") appeal

from Judge Kevin T. Duffy's order of August 28, 1975, denying Plaintiffs' motion for preliminary injunction and dismissing the Amended Complaint as against one Defendant, the New York City Transit Authority. (A3-A15.*)

The action arises under the citizen suit provision of the Clean Air Act, Section 304, 42 U.S.C. §1857h-2, and seeks enforcement of the Transportation Control Plan for the Metropolitan New York City Area (hereinafter "Plan").** Defendants include the State and City of New York and elected and appointed officials of the State and City (hereinafter "State and City"). Also named as Defendants are David L. Yunich in his capacities both as Chairman of the Metropolitan Transportation Authority and the New York City Transit Authority (hereinafter "Yunich","M.T.A." and "Transit Authority", respectively) and the Transit Authority itself.

The decision below is unreported.

ISSUES PRESENTED

1. Where Congress expressly opened the Court for citizen enforcement of the Clean Air Act, did the

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* Numerals preceded by "A" refer to the Joint Appendix.

** The Plan was not a part of the record of this case below although all parties refer to the lengthy document. Copies will be supplied to the Court by Plaintiffs.

District Court err in refusing to consider Plaintiffs Motion for Preliminary Relief when such refusal effectively amends the citizen suit provision and defeats the purpose of speedy enforcement.

2. Did the District Court err in refusing to consider Plaintiffs Motion for Preliminary Relief on the basis of a supposed defect in the manner of mailing a notice of violation to one of the violator's agents where neither the Act nor the federal Agency's regulations require notice to the agent and the agent actually received a copy of the Notice of Violation?

3. Did the District Court err in dismissing the Amended Complaint for allegedly not mentioning the Transit Authority where,

   a) The Amended Complaint made numerous allegations specifically naming the Transit Authority; and

   b) The Court gave no reason for failing to grant Plaintiffs an opportunity to correct the alleged deficiencies by amendment?

STATEMENT OF FACTS

A. History of the Case

Plaintiffs allege that the State and City have massively violated their own Plan to abate air pollution in New York City which the federal Environmental Protection Agency [hereinafter "EPA"] approved pursuant to the Clean Air Act in 1973 [hereinafter "Act"]. 42 U.S.C. §1857a et seq. In the petition to review EPA's plan approval, it was undisputed that the State was in violation of the Plan from the outset. FOE v. EPA, 499 F.2d 1118, 1128 (2d Cir. 1974); (A172.) On July 1, 1974, this Court denied petioners'petition for an order of enforcement, holding inter alia, that the Plan was enforceable under the Act's citizen suit provision and that any enforcement action should be commenced in the District Court. Id.

On August 5, 1974, Plaintiffs served their citizen suit notice of violation. During the statutory 60-day notice period, neither the State nor City brought themselves into compliance and the EPA declined to file its own judicial action. On October 11, 1974, Plaintiffs commenced the action and moved for a preliminary injunction. The District Court ruled on December 17, 1974, that Plaintiffs probably would prevail on both prongs of the test for an

injunction. The Court nonetheless denied the motion, deferring to EPA administrative activities, because of Defendants' pledge that the Plan would be revised. FOE v. Wilson, 389 F.Supp. 1394 (S.D.N.Y. 1974);(A133-35.)

On December 20, 1974, EPA ruled that the State failed to complete its application for a revision. (A134-35, A171.) On January 8, 1975, EPA issued administrative Notices of Violation with respect to 12 of the 32 strategies approved as part of the Plan.* 42 U.S.C. §1857c-8(a). During the next eight months, EPA, continuing to refuse to commence a judicial enforcement proceeding, attempted to negotiate a solution on consent. EPA, however, was only able to negotiate consensual administrative orders with respect to eight of the twelve strategies for which Notices had been issued. (A134-35; A147-48; A159-62.) By the end of July, 1975, a full year of administrative negotiation had resulted in the following:

* The State remained in violation of all strategies contained in the Plan;

* The State and City had consented to orders on eight relatively uncontroversial strategies;

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* The Notices of Violation are filed in the EPA Region 2 enforcement docket as Index Nos. 50216 and 50217. Copies of the Notices of Violation are annexed hereto for the convenience of the Court.

* The State and City had refused to consent to administrative orders on four strategies;

* No administrative action of any kind had been accomplished as to the remaining 20 strategies.

No activity occurred in the instant case during administrative negotiations.

The massive violations, however, significantly harm public health. As strictly required by the Clean Air Act, the Plan was designed to meet federal health standards by reducing carbon monoxide pollution by 78%, with similar reductions for other pollutants. Because of the failure to implement the Plan, carbon monoxide levels have actually increased 25% since the Plan's adoption. (A147-48, A154.) Carbon monoxide is linked to increased death and disease, including aggravation of heart disease. (A27-30, A145-47.) In July, 1975, in New York City, carbon monoxide had climbed to over five times the federal health standards and was projected to reach over six times the standards with a transit fare increase.

On or about Friday, July 25, 1975, the Transit Authority announced without prior warning that it, at

the request of the City, would raise the transit fare in the next week to $.50. (A140.) In the view of Plaintiffs, such an increase, imposed before Plan implementation, would defeat the measures and strategies required by the the Plan, would cause an unlawful worsening of New York City's air quality, and was unnecessary if the Plan's strategies were implemented. On Monday, July 28, 1975, Plaintiffs obtained an order to show cause seeking to enjoin the fare increase until the Plan was implemented, to compel implementation of the Plan, and to join the Transit Authority to the action as a party necessary to grant full relief. (A130-131; A132-137.)

At a brief oral appearance on July 30, 1975, the District Court directed that all briefs on the issue of jurisdiction to entertain Plaintiffs' motion be filed by August 1, 1975, and stated that factual issues would be determined at a later hearing. (A201.)

During pendancy of the motion for preliminary injunction, Plaintiffs took two additional steps. On August 11, 1975, Plaintiffs filed and served an Amended Complaint without leave of court pursuant to Rule 15(a). The Amended Complaint added the Transit Authority as a party and re-identified Yunich as Chairman of the Transit

Authority in addition to his prior identification as Chairman of the Metropolitan Transportation Authority. (A17, A18, A24 and A27.)

Secondly, on August 4, 1975, Plaintiffs moved for partial summary judgment with respect to four specific strategies: after-hours goods delivery, bridge tolls on the free Harlem and East River bridges, selective ban on taxi cruising, and parking reductions. (A229-37.) Plaintiffs selected these four strategies because there was not the slightest dispute that the State and City were in violation. EPA had issued a Notice of Violation on each of the four strategies, but had been pointedly unsuccessful in obtaining the State and City's consent to commence implementation of the strategies on any timetable. (A159-62; A183-84; Notices annexed hereto.)

On August 28, 1975, the eve of the fare increase, the District Court filed its opinion and order denying the motion for preliminary relief and dismissing the Amended Complaint as to the Transit Authority. In addition, the District Court preemptivly denied Plaintiffs' motion for partial summary judgment, although none of the Defendants had yet responded,on the assumption that there had to be issues of fact. (A3-16.)

On August 29, 1975 Plaintiffs filed notice of appeal from the District Court's order of August 28, 1975. On September 8, 1975, Judge Mulligan denied plaintiffs' motion for an expedited schedule for this appeal.

B. Statutory Scheme and Errors Below.

In the Clean Air Act, Congress ordered affirmative action against air pollution to reach set goals by a set date:

> "Air quality standards protective of the health of persons must be achieved within the 3-year period of the approval of the plans to implement ambient air quality standards". S. Rep. 2.*

Congress was fully aware that achievement of this goal would require profound changes: "Some facilities may be closed;" "as much as seventy-five percent of the traffic may have to be restricted in certain large metropolitan areas...." S. Rep. 2.

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*Legislative history of the Clean Air Act cited herein as follows:
"S. Rep." refer tc S. Rep. No. 91-1196, 91st Cong., 2nd Sess (1970).
"H.R. Rep." refers to H. R. Rep. No. 91-1146, 91st Cong., 2d Sess (1970).
"Conf. Rep." refers to Conf. Rep. No. 91-1783, 91st Cong., 2d Sess (1970).
"Leg. Hist." refers to Legislative History of the Clean Air Amendments of 1970, 93rd Cong., 2d Sess.(1974)

Congress was aware also that such sweeping changes would not become a reality without equally major institutional changes, particularly as to enforcement. Under previous clean air legislation, "progress has been regrettably slow" partly because of "failure on the part of the [federal agency] to demonstrate sufficient aggressiveness in implementing present law." H. R. Rep. 5.

So, under the new legislation:

> "To assure that Federal and State agencies aggressively pursue their responsibilities and to supplement their capacities, the bill provides a right of citizen action to seek enforcement of the provisions of the act." S. Rep. 3. See also S. Rep. 36-37.

The citizen suit provision authorizes citizen-beneficiaries of the Act, as private attorney generals, to directly enforce the provisions of the state implementation plans where a 60 day notice has been given and public officials themselves are not diligently prosecuting a civil action in a court. Section 304, 42 U.S.C. §1857h-2.

The District Court, however, three times (two motions for preliminary relief, one motion for partial summary judgment) refused to grant relief by interpreting the citizen suit provision of the Act in

a way that ignores its language and makes it unworkable. As enacted, the citizen suit provision makes violation of an implementation plan schedule of compliance actionable against the violator. The District Court incorrectly insisted, however, that a citizen must also in effect show and prove an additional element, that EPA is in viclation as well. This ruling ignored the plain language of the Act and forced private citizens to shoulder a burden of proof not related to an element of the claim. It further altered the claim from violation of the timetable, a relatively simple claim, to a virtually impossible claim, that EPA had abused its prosecutorial discretion.

The District Court transformed the citizen suit provision into a formula for failure in other ways. The District Court refused to decide the merits of the Plaintiffs' claim, but instead referred the case to EPA for administrative remedies on the basis that it is the Agency that should enforce the Plan. Yet, Congress specifically opened the court to citizen enforcement upon EPA's refusal to commence its own judicial action within the 60-day waiting period. The 60-day waiting period in this case ended more than a year ago. The District Court's view of its jurisdiction deflates and

debilitates the Act's enforcibility; it frustrates public and Congressional expectations; and, indeed, it violates the crystal clear directives of Congress on judicial enforcement.

The District Court further hobbled the citizen suit provision by erecting impossible and erroneous notice requirements which are contrary to the explicit statutory language and legislative history, as well as EPA and court interpretations of notice requirements.

The District Court's errors must be corrected, both to preserve the citizen suit provision which Congress found so essential to the success of the Act and to protect human health in New York City. Plaintiffs accordingly seek a remand, with instructions, on their motion for preliminary relief and a reversal of the District Court's dismissal of the complaint against the Transit Authority.

C. The Motion for Preliminary Relief

1. Plaintiffs' Position. Plaintiffs moved for preliminary relief to compel implementation of the Plan and to prevent the fare increase until the Plan had been implemented on the following bases:

a) The State and City were in violation of every strategy in the Plan. (High Probability of success on the merits.);

b) Air pollution has increased because of the State and City's failure to implement the Plan. Yet the State and City were about to authorize a fare increase which would have been unnecessary because the Plan called for subsidies of the fare through tolls greater than the total fare increase. Furthermore, because the Plan would prevent a changeover to private cars, a fare increase would have been far less damaging to health but for the violations (Irreparable harm);

c) A fare increase at a time when the Plan was in massive violation would increase the likelihood of ultimate failure of the Plan. (Necessity to preserve the status quo pending implementation of the Plan.)

Plaintiffs' expert witnesses, the Plan itself, and this Court have established the relationship between the violations of the Plan and the transit fare.

Plaintiffs submitted affidavits by Gerald M. Sturman, a partner and senior vice president in the engineering firm of Parsons Brinckerhoff Quade & Douglas, Inc. (A210-13.); Brian T. Ketcham, a former City official who was directly responsible for the drafting of the Plan (A138-58; A214-16.); and Robert N. Rickles, the City Commissioner of Air Resources at the time the Plan was proposed (A203-09.) Their affidavits showed that a 43% fare increase (to 50 cents) would cause approximately a 10% loss in transit ridership, or 600,000 fewer trips per day. Based on historical data, this will lead to approximately 9,000 added cars entering the central business district of Manhattan during the morning rush hours. The increase in vehicle entries will result in an additional 15 to 20% increase in carbon monoxide pollution due to the fare increase alone because of resulting traffic congestion and the fact that cars put out far more pollutants at slower speeds.

The resulting harm to public health would not occur but for the violations of the Plan. The violated Plan strategy requiring tolls for the free Harlem and East River bridges was designed to produce $200 million per year to subsidize the mass transit fare. (A157.) The fare increase, according to the Transit Authority's own estimates, by contrast, would produce only $140 million.

(A165; A215.) In addition, the parking strategy of the Plan, together with other strategies, was designed to absolutely limit the number of vehicles entering the central business district of Manhattan. (A145-50.) Only because these strategies are not implemented, the fare increase would have the adverse effect of increasing the number of vehicles entering Manhattan. (A149; A206-07; A211-12.)

Plaintiffs' witnesses showed that the fare increase would jeopardize the ability of the Plan to ultimately protect health as well. (A149-50; A207-09; A211-12.) Those witnesses showed that an essential element of the Plan was to reduce vehicular traffic in Manhattan. By further increasing the vehicular traffic, thereby effecting a number of private and public sector decisions, a fare increase will jeopardize ultimate implementation of the Plan.

The Plan itself admits that timing is critical in achieving the proper balance between mass transportation and incentives to private transportation: "It is imperative that the public transportation improvements procede vehicular access restrictions...." (Plan 5-9.) Defendants acted contrary to what the Plan contemplates by simultaneously failing to restrict vehicular access while discouraging public transportation by increasing its cost.

This Court had already recognized the relationship between the Plan strategies and the transit fare in FOE v. EPA, supra 499 F.2d at 1125. Relying upon the representation by the State and EPA, this Court made clear that the absence of an express limitation on transit fares was acceptable only because there were other strategies in the Plan, particularly the parking strategy, which would limit auto use. FOE v. EPA, supra 499 F.2d at 1125.

On subject matter jurisdiction, Plaintiffs submitted that there was a clear nexus between the public health consequences of a fare increase and the violations of the Plan. Plaintiffs also invoked the court's traditional power to perserve the status quo to safeguard the thing at issue, the Plan to protect public health in New York City. Danielson v. Local 275, 479 F.2d 1033, 1037 (2d Cir. 1973); 7 Moore's Federal Practice ¶65.04[1].

2. The EPA's Position. The EPA agreed with Plaintiffs and concluded that the fare increase will "detrimentally affect the public health and welfare" of the City of New York. (A224.) Judge Duffy had instructed all counsel on the return date of the motion to communicate with the EPA and to request that EPA state its position on the fare increase by August 1, 1975. (A200.) EPA complied.

(A222.) It delivered a timely statement to the Court in which it reviewed the facts of the fare increase, calculated that Plaintiffs' prediction of a 10% loss in mass transit riders was accurate (A224-28.),and concluded that "an increase in fares on New York City Transit Authority subways and buses will detrimentally affect the public health and welfare and that other measures are available, and required by the present [Plan], which would avoid this harmful result." (A226.)

EPA expressly pointed out that the City and State had other options under the Plan, particularly the toll strategy, which would obviate the need for a fare increase even in time of financial crisis. EPA stated as follows:

> "For example, B-7, one of the strategies of the TCP for which Notices of Violation were issued to the State and City of New York in January, 1975, requires the imposition of tolls on the East and Harlem River Bridge crossings. This measure would have three beneficial results:
>
> (1) It would reduce the use of scarce fuel;
>
> (2) It would provide cleaner air; and
>
> (3) By encouraging use of car pools, it would avoid unnecessarily heavy costs to the single-passenger commuter.
>
> "The imposition of tolls on the East and Harlem River bridge corssings, paralleling

> the tolls on the Hudson River crossings from New Jersey, would produce additional revenues while being in harmony with the goals of the TCP. It would avoid the unfavorable environmental consequences of a subway and bus fare increase and at the same time help restore the City's fiscal position." (A225.)

3. The Defendants' Position. The State, City and Transit Authority raised no valid arguments in response. While not disputing that they were in violation of the Plan, the State and the City relied upon the fact that EPA's administrative negotiations were still alive, and again appealed to the Court to stay enforcement as it had eight months earlier to permit further negotiations with EPA. (A179-182; A217-221: A166-167.)

Neither the State, the City, nor the Transit Authority denied that a 15 to 20% increase in air pollution constituted irreparable harm. The State, significantly, agreed with Plaintiffs that the fare increase would cause a 10% loss in ridership. (A219.)

The City, noting that maintenance of the transit fare was not an express strategy in the Plan, argued that the citizen suit provision of the Clean Air Act restricted the District Court to ordering only compliance with the Plan strategies. (A181-82.) Plaintiffs showed, however, that section 304(e) of the citizen

suit provision specifically preserved the entirety of the court's equitable powers, which would include the traditional remedies designed to preserve the status quo and to grant full relief. 42 U.S.C. §1857h-2(e). (Plaintiffs' Answering Memorandum, August 1, 1975 at 9-12.)

The City and Transit Authority relied upon their fiscal difficulties. Plaintiffs, however, showed that since there was a strong probability of success on the merits, they need only show a possibility of irreparable harm to Plaintiffs. The fiscal difficulties posed by the City must be addressed on the claim of impossibility on which Defendants have the burden, not Plaintiffs. (Plaintiffs' Answering Memorandum, August 1, 1975 at 2.) Moreover, in recognition of the City's fiscal needs, Plaintiffs expressly asked that any injunction be designed not to add a fiscal burden to the City, but that compliance should fall exclusively upon the Transit Authority and the State. (Plaintiffs' Answering Memorandum of August 1, 1975 at 4-7.)

In addition, Theodore W. Kheel independently asked to intervene in any hearing on Plaintiffs' motion on behalf of the Authority for Coordinating Transportation, Inc. Kheel stated that at such hearing he would present evidence to support his conclusion that the Transit Authority could meets its financial needs without resorting to a fare increase. (A238-40.)

The Transit Authority relied upon the notice requirement of the citizen suit provision. The Transit Authority first noted that Plaintiffs' Notice of Violation actually received by Yunich and John de Roos, Chairman and General Counsel of the Transit Authority respectively, was only addressed to Yunich in his capacity as Chairman of the M.T.A. (A93-129.) The Transit Authority invoked its separate corporate status under State law and argued that the failure to address the Notice of Violation to Yunich in both capacities absolutely prevented any judicial action against the Transit Authority. (A167.)

Plaintiffs responded that, however addressed, the Transit Authority had in fact received the Notice with the information contained therein naming and pointing specifically at the Transit Authority. (A103, A110, A116, A118, and A124.) Furthermore, Plaintiffs argued that a Notice of Violation was unnecessary in any event as against the Transit Authority under the Act. It was unnecessary to send a notice to an agent or delegate agency of the actual violator (in this case, the State) when notice had already been sent to the violator itself. Secondly, under the District Court's Rule 65 jurisdiction, no notice of any kind was required to obtain equitable relief against an entity acting in concert with or participating with a defendant appropriately before the court. Section 304(e); 42 U.S.C. §1857h-2(e).

4. The Decision Below. Judge Duffy denied the motion for a preliminary injunction without reaching the merits. As to the fare increase, Judge Duffy ruled that statutory and "due process" notice to the Transit Authority was lacking. (A5-8.) He also characterized Plaintiffs' detailed factual affidavits as "pure speculation," although both the EPA and the State admitted the accuracy of Plaintiffs' conclusion on the effect of the fare increase on transit ridership and no party disputed the effect of the loss of ridership on air quality. (A10, A224-228, A219.) Judge Duffy further dismissed the Transit Authority as a Defendant because he said that the Transit Authority was not mentioned in the Complaint, which is untrue. (A9, A34, A57, A70, A72)

While denying relief against the fare hike on these bases, Judge Duffy also touched upon other aspects of the application. He indicated that the appropriate standard of violation was not solely the violation of the Plan, but rather also involved the status of EPA's administrative enforcement proceedings. (A12-13.) He said that he had some question about subject matter jurisdiction, although he only cited to this Court's decision in FOE v. EPA, supra, which found that there was a nexus between the transit fare and other strategies of the Plan. (A9.)

As to the financial feasibility of complying with an order, Judge Duffy said that no party had presented a thorough analysis of the issues, but did not comment on who had the burden to make such an analysis. (A10-11.) His statement on this issue, moreover, conflicts with his earlier direction that any factual dispute would be resolved at a hearing. (A201.)

As to Plaintiffs' motion for a preliminary injunction enforcing the Plan, Judge Duffy refused for the second time to deal with the merits. (A11-14.) He made three observations. First, he ruled that a claim for relief required more than proof of violation, as already noted. Secondly, he observed that Clean Air Act enforcement belonged in the agency, not the court -- an observation wholly at odds with the Clean Air Act and its legislative history. (A13.) Thirdly, he ordered that the Complaint be dismissed unless Plaintiffs served a notice of violation upon EPA or succeeded in obtaining EPA intervention within 10 days; he viewed any consideration on the merits as speculation without EPA joinder as a party. (A10, A13-14.)

Judge Duffy also preemptively denied Plaintiffs' motion for partial summary judgment, ruling that minor

disputes as to the status of EPA's negotiations with the City and State presented issues of fact. (A11-12, A14.) By preemptively denying the motion for summary judgment, Judge Duffy prevented Plaintiffs from showing that these issues of fact were not relevant issues of fact under the Act and violations alleged thereunder. The District Court's precipitious dismissal prevented partial resolution of the action and further deflated effective citizen enforcement.

ARGUMENT

POINT I

THE CLEAN AIR ACT OPENS THE COURT FOR CITIZEN SUIT ENFORCEMENT FOR THE PURPOSE OF ASSURING ADEQUATE AND SPEEDY ENFORCEMENT OF THE ACT'S PUBLIC HEALTH GOALS. THE DISTRICT COURT, IN REPEATEDLY REFUSING TO TAKE JURISDICTION OF A CITIZEN SUIT ACTION, AND IN DENYING PLAINTIFFS'MOTIONS FOR PRELIMINARY RELIEF, HAS EFFECTIVELY AMENDED THE ACT AND DEFEATED THE CONGRESSIONAL GOAL OF SPEEDY ENFORCEMENT.

This is a case like C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1974); Plaintiffs are entitled to preliminary relief because Congress has clearly opened the court to them and because any other result would amend the Act and defeat the purpose of speedy enforcement.

A. Conflicts with the Statutory Language

The citizen suit provision of the Clean Air Act makes actionable a violation of the standards or timetables of an implementation plan in a case brought by a private litigant. 42 U.S.C. §1857h-2(a)(1),(f). Congress was explicit that if EPA did not go to court to enforce the Act, citizens could.

The District Court, however, established a

different standard for citizen access to judicial relief. It denied Plaintiffs' motion for preliminary relief to enforce the Plan and for partial summary judgment on the grounds that there were some minor disputes as to the status of negotiations between EPA and Defendants, although it is undisputed that Defendants are in violation of each of the Plan's strategies. (A11-13.) Having made an inquiry into the status of EPA administrative enforcement activities an essential part of finding a violation, the District Court then ruled that EPA is an indispensable party which Plaintifs must bring in EPA or suffer prompt dismissal. (A13-14.)

The conflicts between Congress's view and District Court's view of the citizen suit provision are apparent upon the face of the statute. First, the District Court amends the statute's standard of violation to include proving charges against EPA. The citizen suit provision, however, authorizes actions against one "who is alleged to be in violation of .... an emission standard or limitation under this Act...." 42 U.S.C. §1857h-2(a)(1). The "District Court shall have jurisdiction .... to enforce such an emission standard limitation...." Id. at §1857h-2(a). Section 304 does not make the status of EPA's administrative enforcement activities an element of the violation; to the contrary, only diligent prosecution of a judicial enforcement

action by EPA can be a bar to a separate citizen action. Id at §1857h-2(b)(1)(B).

The Senate Report expressly states that enforcement, whether by the administrative agency or in judicial actions brought by citizens, should involve exactly the same standards -- the standards of the Plan. S. Rep. 37. See also Leg. Hist. 352, 353; S. Rep. at 38. Congress relied upon the fact that this is a plain, workable standard, well within courts' expertise. S. Rep. 38; Leg. Hist. 353; NRDC v. Train, 510 F.2d 692, 725 (D.C. Cir. 1975.) As the Senate Report made clear, the broad questions as to how to attain clean air were to be answered at the outset in the objective standards in the Plan so that courts could avoid going beyond the narrow question of whether the standards were met.* S. Rep. 36. Compliance with statutory schedules is the issue, not whether EPA had acted reasonably. Cf., NRDC v. EPA, 475 F.2d 968,970 (D.C. Cir. 1973).

The second conflict between the District Court's ruling and the Act is that Section 304 does not make EPA an indispensable party, but rather merely

*This Court has already held that Plan at issue in this action is sufficiently definite for enforcement proceedings in the District Court. FOE v. EPA, supra.

allows it to intervene as of right. 42 U.S.C. §1857h-2(a)(1),(c)(2). In contrast, Section 304 (b)(1)(A) makes EPA the necessary recipient of a notice of violation. Id.at §1857h-2(b)(1)(A). Once a citizen suit has been properly commenced,the action should continue to judgment whether or not EPA is joined. Metropolitan Wash. Coal. for Clean Air v. District of Columbia, 511 F.2d 809, 814 (D.C. Cir. 1975).

The third conflict between the District Court's ruling and the Act is that the statute makes no provision for reference of the Plan back to the administrative agency after the 60 day notice period has run, as the District Court effectively has done twice in this case. To the contrary, if the violation is not corrected during the notice period, the citizen litigant is prevented from proceeding in a judicial proceeding only if government is itself diligently prosecuting a judicial enforcement action on its own. 42 U.S.C. §1857h-2(b); Conf. Rep. 56. Since a citizen may intervene in an EPA action as a matter or right, the citizen is in a position to demand judicial relief for uncorrected violations and participate in the judicial process. This is significant because "[e]nforcement of an order to abate must be obtained in the courts, whether an agency or a private citizen initiates action". Leg. Hist. 353 (Memorandum introduced by Sen. Muskie).

Here, the District Court has in effect stayed the suit without the government bringing a judicial enforcement action of its own.

B. Conflicts with the Legislative History

The District Court's opinion and rulings on these related issues makes no reference to the citizen suit provision's language or legislative history. (A11-14.) The District Court sweeps aside the Congressional scheme solely on the basis of the belief that enforcement of the Plan is beyond its expertise and too time consuming not to be left with the Agency. (A13; FOE v. Wilson, supra.) The same objections were raised in an effort to delete the citizen suit provision and rejected by Congress. S. Rep. 36, 37-38; Leg. Hist. 273-79 (Sen. Hruska), 352-53 (Sen. Muskie), 387 (Sen.Cooper). While this debate emphasized that the courts would be applying an objective, workable standard, the District Court's mistaken belief to the contrary must have led it to overestimate the task at hand. In any event, Congress decided that any added burden on the courts was warranted because of the importance attached to citizen enforcement. Leg. Hist. 138, 280, 352-353 (Sen. Muskie); 355-57 (Sen. Hart); 387 (Sen. Cooper).

The Act's new approach to enforcement was enacted because of a perceived public health emergency and because past government enforcement was too restrained. E.g., S. Rep. 1, 36.

The District Court, nonetheless, acts as if the citizen suit provision did not change at all the relationships between Plaintiffs, the violator, the agency, and the courts. Congress, however, had consciously "broadened" the public role, and was creating a "novel concept of public participation". NRDC v. Train, supra 510 F.2d at 700; Leg. Hist. 262 (Sen. Spong), 349 (Sen. Scott); Leg. Hist. 387 (Sen.Cooper). As such, the provision was much debated and safeguards were inserted to avoid unnecessary burdens on the court. Actions under section 304 are permissible only in the defined set of cases, only after 60 days notice, and only if the violation is not corrected or if EPA does not go to court. E.g., S. Rep. 36-38. Moreover, to deter those who would not exercise these new rights responsibly, the Act allows the recovery of attorneys' fees by defendants where plaintiffs bring merely harrassing actions. E.g., S. Rep. 38.

C. Conflicts with the Congressional Purpose of Speedy Enforcement

This new arrangement of rights and responsibilities

was designed to prod government agencies to take primary responsibility, yet still provide sure protection against bureaucratic delays and politics which might delay health protection. E.g., Leg. Hist. 127 (Sen. Muskie); 262 (Sen. Spong); 349 (Sen. Scott); S. Rep. 36-37. This was to be accomplished by allowing the regulatory agency 60 days to act against violations; thereafter District Courts "shall" have jurisdiction. 42 U.S.C. §1857h-2(a).

Similar to the provision for Plan enforcement, Plan adoption is marked by a series of duties which "shall" be done in set time periods of reasonable, but not overly generous, duration. 42 U.S.C. §1857c-3-4-5. No less than the other timing provisions of the Act, the choice of 60 days was quite conscious. The Senate Bill allowed EPA 30 days to act, but after objections that this allowed EPA too little time, an appropriate change was made in the Conference version. Leg. Hist. 730 (Memorandum of Law); Conf. Rep. 55-56. The District Court has undone the ability of the citizen suit provision to prod speedy agency action by extending the 60 days allowed by Congress to well over a year through the court's refusal to act in the fact of undisputed violations.

The case at bar illustrates the practical

significance of the District Court's deviation from the statutory requirements. In the Congressional version, there is a relatively simple procedure to ascertain whether violations exist. Even though this is an unusually complex Plan, anyone familiar with New York City may read the timetables of the Plan and know, to a certainty, that many of the milestones have been missed. Indeed, EPA has already found the Defendants to be in violation as to 12 of the 32 strategies. Under the District Court's version, a broad inquiry is necessary to ascertain whether Defendants and EPA have in effect acted reasonably. This greatly expands the burden on the courts. It would also be fatal to the citizen suit provision because public interest groups simply do not have the resources and ready access to information to take on this burden.

Were the District Court to have applied the Congressional test of violation, Plaintiffs would have succeeded in their motion for preliminary relief enforcing the Plan because the District Court could not have ruled that there was a question as to the possibility of success on the merits as grounds for denying preliminary relief. This approach would have closed the issue of liability and focused energies on shaping realistic solutions. Instead, the District Court

action permits extended delays in coming to grips with enforcement.

Defendants are in undisputed violation, for example, of bridge toll and parking strategies and EPA has so found. (EPA Notices of Violation annexed hereto.) The District Court denied partial summary judgment on these two strategies on the basis of relatively minor disputes as to the status of EPA's and Defendants' negotiations. (A12.) But, it was undisputed that Defendants had refused to sign any administrative orders on their strategy for eight months. (A160.) The District Court's interpretation thus allows violators to use their persistent refusal to correct the problem as a means to avoid a citizen suit provision "directed at providing citizen enforcement when bureaucracies fail to act". Leg. Hist. 352 (Sen. Muskie).

This ruling allows Defendants to avoid the Plan strategies which they were unable to delete through their unsuccessful attempt to revise the Plan. (A134-35, A171.) The Supreme Court has ruled, however, that

> "if such a person cannot obtain a revision, because for example the plan as so revised would no longer insure timely attainment of the national standards, then under the Act he has no alternative but to comply or to obtain a postponement of the requirement's effective date-if he can satisfy the stringent conditions of §110(f)."
>
> Train v. NRDC, 421 U.S. 60, 90 (1975).

The District Court's decision to the contrary allows a violator to avoid both compliance and the procedures for postponement. 42 U.S.C. §1857c-5(f). This ruling creates a significant loophole in the Act's systematic safeguards against delay in protecting health. Congress asserted itself actively as to the tempo of the process. Each step was to be accomplished within a set time so as to produce implementation plans that "insure" achievement of health standards by a date certain. 42 U.S.C. §1857c-5(a)(2)(B); Id. at §§1857c-3, -4, -5; NRDC v. EPA, supra 475 F.2d at 970. A state has the burden of showing that its plan will attain the standards on the basis of specific criteria. Id. at §1857c-5(a). EPA approves on the basis of a documented plan and subject to the Administrative Procedure Act rulemaking requirements. 5 U.S.C. §553 (1970). The same set of safeguards are applicable to revisions of a plan, extension of the dates by which the standards must be met, or postponement for individual polluters. 42 U.S.C. §§1857c-5(a)(3),(e)(f). The District Court's interpretation allows EPA and the State to slow down the tempo of health protection, or even weaken Plan strategies, without any of the Act's safeguards. The Act is to the contrary. Administrative procedures are to be accomplished on the violator's time, not the

public's. Train v. NRDC, 421 U.S. 60, 92 (1975).

Yet, the District Court's refusal to enforce, coupled with EPA's refusal to commence its own action, effectively gives Defendants the benefits of a revised Plan with none of the Act's safeguards. If the District Court had applied the correct standard of violation, the hearing on remedy would have provided the necessary safeguards. Any departure from the tempo and standards of the Plan would have to be explained in a record on which Defendants would have the burden. If EPA sanctioned any delays, it, too, would have had to explain itself. In these circumstances, the bridge toll and parking strategies could not have remained in violation without the issuance of any orders for many months. Answers would have had to be forthcoming as to why 20 strategies remain in violation without any enforcement action.

Finally, the result would not be administrative orders, but judicial orders.* This is significant since

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* If a violation is found, a judicial remedy is fashioned...." (Leg. Hist. 353 (Sen. Muskie).)

a violator cannot be sanctioned until brought into court. Leg. Hist. 353 (Sen. Muskie).

In sum, the District Court's application of the citizen suit provision is flatly at odds with the statutory scheme. The citizen suit provision was regarded as absolutely essential to achievement of the Act's health goals. Leg. Hist.138 (Sen. Muskie). The same provision has been repeated almost verbatim in Federal Water Pollution Control Amendments of 1972 and the Federal Noise Control Act. 33 U.S.C. §1365; 42 U.S.C. §4911. This case illustrates just how damaging this misinterpretation can be to all three public health laws. Accordingly, Plaintiffs submit that it is essential that this Court correct the District Court's errors. Specifically, Plaintiffs ask that the District Court be instructed that -

1. The District Court shall exercise jurisdiction and hear the case since the sixty day notice period has run without the government commencing judicial enforcement action. 42 U.S.C. §1857h-2(a)(1),(b).

2. The proper standard of violation is violation of the Plan. Id. at §1857h-2(a)(1).

3. If a violation is found, the District Court shall enforce the Plan. Id. at §1857h-2(a).

4. The case does not fail for want of jurisdiction in the absence of EPA. Metropolitan Wash. Coal. for Clean Air v. District of Columbia, supra, 511 F.2d. at 814-15; 42 U.S.C. §1857h-2(a)(1),(b)(1)(B).

Plaintiffs of course do not object to a joinder of EPA should EPA itself finally decide to intervene, or on the motion of another participant in the action including the Court. But joinder under the Court's discretionary authority is far different from basing jurisdiction over the complaint in the first instance on joinder.

POINT II

THE COURT ERRED FOR THREE SEPARATE REASONS IN RULING THAT THE CITIZEN SUIT NOTICE PROVISION PRECLUDED JURISDICTION OVER THE TRANSIT AUTHORITY; (A) THE STATUTE DOES NOT REQUIRE NOTICE TO DELEGATE AGENCIES OF THE STATE; (B) THE STATUTE DOES NOT REQUIRE NOTICE TO PARTIES JOINED FOR THE PURPOSE OF GRANTING FULL RELIEF; (C) THE TRANSIT AUTHORITY RECEIVED NOTICES OF VIOLATION AND THE DISMISSAL WAS CONTRARY TO THE LEGISLATIVE PURPOSE.

The District Court ruled that it lacked jurisdiction over the Transit Authority because Plaintiffs had allegedly not provided the Transit Authority with notice of violation under the citizen suit provision. (A5-8.) Before showing why the citizen suit provision did not require any notice to th Transit Authority as a matter of law, it is well to review the facts for they show that the Transit Authority received actual and statutory notice and that, as a practical matter, the court's ruling served no just purpose.

On August 5, 1974, Plaintiffs sent an exhaustive notice of violations to the Governor, the EPA, and the New York State Department of Environmental Conservation. The notice specified each milestone of each Plan strategy, whether or not the milestone had been violated, and the delegate agencies to which

the Plan assigned responsibility. (A93-129.) Requiring, as it did, a 34 page table, the notice was as thorough as reasonably possible.

Although not required by the Act or EPA's regulations, Plaintiffs also sent the notice to 15 agents of the State to whom the State had delegated some of its responsibility to implement its Plan.* The Plan was, however, imprecise in many respects as to such delegation. In particular, the Transit Authority is seemingly identified in the Work Plan as part of the Metropolitan Transportation Authority ["Metropolitan Transportation Authority (Transit Authority)"] (E.g., Plan B-13.) Technically each are separate corporations, with delegated duties under the Plan. Nonetheless, they have identical Boards of Directors; the same chief executive, Yunich (A195.); issue a combined annual report; and circulate literature to the public which makes the Transit Authority appear as a subsidiary.

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*David L. Yunich, M.T.A.; Michael J. Codd, New York City Police Department; Alfred Eisenpreis, Economic Development Administrator; J. Douglas Carroll, Jr., Tri-State Regional Planning Commissioner; Arnold R. Fisher, New York State Department of Motor Vehicles; Robert Low, New York City Environmental Protection Administration; William J. Ronan, The Port Authority of New York and New Jersey; Theodore Karagheuzoff, New York City Department of Traffic; Morris Tarshis, Bureau of Franchises; Paul O'Dwyer, New York City Council; John Zuccotti, City Planning Commission; Michael Lazar, New York City Transportation Administrator; Elinor Guggenheimer, Department of Consumer Affairs; Moses L. Kove, Taxi and Limousine Commission; and Abraham Beame, Mayor of the City of New York.

Failing to pierce the Plan's imprecision of reference, Plaintiffs mailed a copy of the notice of violation to Yunich, but only addressed to him in his capacity as Chairman of the M.T.A. (A93.) The original Complaint, like the notice, identified Yunich as a Defendant solely in his capacity as Chairman of the M.T.A.

The practical insignificance of failing to distinguish between the entities and the two public authority hats worn by Yunich is highlighted by the fact that the General Counsel of the Transit Authority has represented the M.T.A. and the Transit Authority at all times during the litigation, up to and including this appeal.

The separate corporate identities raised a problem only when relief was sought against the fare increase. The Transit Authority has singular statutory authority over the fare. N.Y. Pub. Auth. Law §1205. Plaintiffs decided that it was preferable to make the Transit Authority a party Defendant for the purpose of granting full relief. But Plaintiffs decided that they need not and should not send a new notice of violation to the Transit Authority.

First, when the motion for preliminary injunction was filed a few days after the fare increase was announced, the Transit Authority indicated that the fare

increase would go into effect almost immediately. There simply was no time for a 60-day notice. Second, the fare increase was not itself a violation of a specific Plan strategy and therefore was not the proper subject for a "notice of violation." Third, the statute did not require a notice of violation both as a matter of literal construction or to vindicate any statutory purpose as expounded in this Court's decisions in Conservation Society of Southern Vermont v. Secretary, 508 F.2d 927, 938-39 n.62 (2d Cir. 1974), vacated on other grounds, ___ U.S. ____ (1975), and NRDC v. Callaway, Dkt. No. 75-7048, Slip Op. at 6, 7 and n.4 (2d Cir. September 9, 1975).

The District Court ruled, however, that this Court's reasoning was not controlling, and held instead that notice was a due process right of the Transit Authority requiring strict and technical compliance. (A3-8.)

A. The Statute Does Not Require Notice to a Delegate Agency of the State in an Action to Enforce Implementation of a State Plan.

Citizen notice, prior to service of a complaint and summons, is necessary only to the extent required by statute. The Clean Air Act citizen suit provision, Section 304, provides in pertinent part that:

> "No action may be commenced...under subsection (a)(1)...prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the state in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order...". 42 U.S.C. §1857h-2(b)

Notice was given to (i) the Administrator, (ii) the State in which the violation occurred, and (iii) the State as the alleged violator. Here, the violation was the failure to implement the State's Plan in its totality. Section 107(a) of the Act provides that it is the state with "primary responsibility" for the implementation plan, and section 110(a)(1) directly affixes responsibility on the state. 42 U.S.C. §§1857c-2(a), -3(a)(1). The Act defines "State" in a manner that excludes any governmental agency of lesser size. Section 302(d), 42 U.S.C. §1857h-(d). The EPA has expressly ruled that any delegation by a state to its subdivision does not "relieve the State of responsibility under the Act for carrying out" the Plan. 40 C.F.R. §51.11(f). Accordingly, the Transit Authority and other entities of the State were simply agents of the State for the purposes of this case seeking to force the State to implement its Plan.

The statute does not require service on the State's agents in this case any more than it would require service upon all the employees of a corporate polluter

who have any control over its emissions. 40 C.F.R. §54.2(c). Any other interpretation would turn the notice provision into an obstacle course. For example, plaintiffs, as here, may often have imprecise information as to the violator's delegations to its agents. Congress was concerned to avoid such results; the Senate Committee stated that the regulations under the notice provision:

> "should not require notice that places impossible or unnecessary burdens on citizens but rather should be confined to requiring information necessary to give a clear indication of the citizens' intent". S. Rep. 37.

Significantly, EPA's citizen suit regulations do require service upon the State environmental agency, but do not require service upon all the agents of a violator. Only the principal must be served through a responsible agent. 40 C.F.R. §54.2(c). In contradistinction to the limited number of persons who shall receive notice, the notice to the principal shall identify the "person or persons responsible for the alleged violation". 40 C.F.R. §54.3(b).

Here, Plaintiffs were in full compliance with EPA's regulations. Notice was served upon the Administrator, the Governor, and the State Department of Environmental Conservation. The notice named the Transit Authority among other agents of the State as

not having fulfilled their delegated responsibilities under the Plan. (A103, A110, A116, A118.)

EPA has itself found that a notice of violation concerning the failure of the Transit Authority to do its delegated duty under the Plan need not be served upon the Transit Authority. (See Section 113(a); Notices annexed hereto.) When EPA issued its Notice of Violation of Plan strategy B-5 under section 113(a) of the Act it sent the Notice to the State and the City, but not to the Transit Authority, although this strategy is directed primarily at the Transit Authority. Subsequently, the State (not the Transit Authority) admitted violation of the strategy calling for Transit Authority implementation in the EPA administrative order. (A172.)

Thus, whether one looks at a Section 304 citizen suit notice or a Section 113(a) notice of violation, service of notice upon the Transit Authority itself was statutorily unnecessary because the violation concerned the failure to implement the Plan for which the State was primarily responsible and under which the Transit Authority had only secondary responsibility.

B. The Statute Does Not Require Notice to a Party Joined for the Purpose of Granting Full Relief.

Notice against the Transit Authority for the violation of the Plan was unnecessary for an additional reason in this case. The Transit Authority was joined for purposes of the motion for preliminary relief, not as a violator, but as a party necessary to grant full relief. While the Transit Authority had, of course, failed in its own delegated duties under the Plan (Complaint, Par. 44; A34, A57, A64, A70, A72.) the immediate need for joinder related solely to the fare increase, which was not a violation of any express strategies of the Plan. Joinder for the limited purposes of Rule 65 preliminary relief did not require citizen suit notice pursuant to Section 304 because the theory of joinder was not that the Transit Authority was violating the Plan.

The District Court's error comes from its confusion between subsection (a) of the citizen suit provision, which specifies what is actionable, and subsection 304(e), which preserves traditional remedies in citizens suits. 42 U.S.C. §1857h-2(a), (e). The notice provision is expressly geared to subsection (a), while the Transit Authority was brought in under subsection (e). Id. at §1857h-2(b).

Subsection 304(e), explicitly preserving existing remedies, has been broadly interpreted to preserve all rights and remedies of the citizen even when invocation of these other rights and remedies entirely eliminates the 60-day notice provision with respect to a citizen suit cause of action. Conservation Society of Southern Vermont v. Secretary, supra 508 F.2d at 938; NRDC v. Callaway, supra at 7. Such interpretation accords with the legislative history which intended Section 304 as an additional weapon in the citizen's arsenal, not as an added barrier. NRDC v. Train, 510 F.2d 692, 699-703 (D.C. Cir. 1975); Metropolitan Wash. Coal. for Clean Air v. District of Columbia, 511 F.2d 809, 814 (D.C.Cir. 1975).

It is well settled that the courts of the United States have the inherent power and authority under the all-writs act, 28 U.S.C. §1651, to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgment, and to prevent them from being thwarted and interferred with.

> "Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." Adams v. U.S. ex rel. McCann Illinois National Bank and Trust Co. v. Chicago R.I. & P. Ry Co., 294 U.S. 648, 676 (1935); 9 Moore's Federal Practice ¶110.29.

Thus, the District Court erred in two ways. It misread the citizen suit provision as reducing the ability of a plaintiff to obtain preliminary relief in a properly brought, pending citizen suit. Secondly, it misunderstood Plaintiffs' basis for joinder of the Transit Authority and motion for preliminary relief and applied a notice requirement when the predicate of violation was missing.

C. The Chairman and General Counsel of the Transit Authority Received a Copy of the Notice of Violation; Dismissal on the Basis of Lack of Notice in such Circumstances was Contrary to the Congressional Purpose.

Plaintiffs also sought to call the Court's attention to the fact that the Chairman and General Counsel of the Transit Authority actually received a Notice with all the information contained therein, and that dismissal for lack of notice served no just purpose. (Plaintiffs' Answering Memorandum, August 1, 1975 at 14-15.) The District Court refused to consider these arguments on the theory that notice was a "due process" right of the Transit Authority. (A5-8.) This was error.

Due process is satisfied by personal service of a complaint and summons as was done in this case. More specifically, this Court's decisions view the

Clean Air Act's notice requirement not as a due process right, but functionally, in terms of its purpose to trigger administrative enforcement action. Conservation Society of Southern Vermont v. Secretary, supra 508 F.2d at 938-39; NRDC v. Callaway, supra at 7, 7 n.4; accord, NRDC v. Train, 510 F.2d 692, 698-703 (D.C.Cir. 1975).

This is as Congress intended. S. Rep. 37. No appellate court suggested, as did the District Court, that the 60-day rule constituted a due process right. Indeed, the panel in NRDC v. Callaway, supra, indicated in its alternate holding that once the EPA has decided not to act on the citizen's notice, the citizen need not wait the full 60 days but might commence his action immediately. NRDC v. Callaway, supra at 7, 7 n.4.

Had the District Court inquired into the purpose to be served by additional notice to the Transit Authority, it would have seen that requiring additional notice was unnecessary and inequitable. The Transit Authority was being joined to seek relief against the fare increase while the alleged defect was to notify the Transit Authority of violations of the Plan. Furthermore, the violations of specific strategies to be carried out by the Transit Authority had been conceded by the State in an EPA consent

order. Moreover, the Chairman and General Counsel of the Transit Authority had actual notice of Plaintiffs' intentions gained from personal receipt of Plaintiffs' Notice and from a year's participation in the case. Finally, the EPA had repeatedly refused to commence a judicial enforcement proceeding. Service of a further notice of violation in these circumstances would be non-sensical because "the purpose of the 60-day waiting period, which is to give the administrative agencies time to investigate and act on an alleged violation, had been served." NRDC v. Callaway, supra at 7, n.4.

Significantly, at no time did the Transit Authority suggest that it was deprived of any right of substance. Indeed, it claimed, in effect, that notice would have been, at best, pro forma and a waste of effort. The Transit Authority asserted that it had no fiscal alternative to a fare increase and was compelled to act. (A163-66.)

Thus, by misconceiving notice as a due process right, the District Court erred by making notice an "absolute barrier" for no rational purpose in direct contradiction of this Court's decisions. Conservation Society of Southern Vermont v. Secretary, supra; NRDC v. Callaway, supra.

POINT III

THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT PURSUANT TO RULE 8 BECAUSE THE COURT OVERLOOKED THE RELEVANT PORTIONS OF THE AMENDED COMPLAINT AND, IN ANY EVENT, BECAUSE DISMISSAL WAS NOT THE APPROPRIATE REMEDY.

As an alternative ground for dismissing the Amended Complaint against the Transit Authority and also for not entertaining Plaintiffs' motion for a preliminary injunction, the District Court found a violation of Rule 8 in that the Transit Authority "is nowhere mentioned in the complaint." (A9.) To the contrary, the Amended Complaint, at Paragraph 44, together with the Table of Violations annexed as part of the Complaint, separately specifies the Transit Authority as a responsible delegate agency under four of the Plan's strategies all of which are in violation. (A34, A57, A70, A72.)

The District Court's confusion on this issue is even more inexplicable because Paragraph 44 of the amended Complaint alleges, as an example, specific violations of strategy B-5 (Increased Express Bus Service and Preferential Lanes). (A34.) The Transit Authority acknowledged that strategy B-5 was directed at it, describing strategy B-5 as "the only strategy directly applicable to this Authority." (A166.) It annexed to its papers the

State's admission of violation of strategy B-5 and consent to an order as proof of its good faith attempts to comply with strategy B-5. (A171-78.)

Faced with such express allegations and a clarifying admission, the District Court nevertheless reasoned that the language "Metropolitan Transportation Authority (The Transit Authority)" in Paragraph 44 of the Complaint is "insufficient". Ambiguities in the pleadings are, of course, to be construed in favor of the pleader. U.S. Plywood Corp. v. Hudson Lumber Co., 17 F.R.D. 258, 261 (S.D.N.Y. 1955). The ambiguity of the reference "Metropolitan Transportation Authority (Transit Authority)", if indeed ambiguous, cannot be laid on Plaintiffs' doorstep. The formulation and reference to the Transit Authority is a direct quotation from the Plan itself. (Plan Appendix B, p. B-13.) Plaintiffs had attacked just such indefiniteness in the Plan in its Petition for Review before this Court. The Court overruled the objection, holding that the Plan was sufficiently definite for enforcement. FOE v. EPA, supra at 499 F.2d 1123-24 (2d Cir. 1974).

Given that the Transit Authority understood the phrase in question, and that the phrase was a direct quotation from the Plan, the District Court's objections to the formulation of the Complaint are in

clear violation of the instructions in Rule 8(f) that "all pleadings shall be construed as to do substantial justice." The District Court's departure from this rule is all the more evident in that it completely ignored other allegations of violations listed in the annexed Table of Violations where the Transit Authority is separately named. (A57, A70, A72.)

The District Court misconstrued the theory of the Plan and of the amended Complaint. In both contexts, the primary liability for the missed milestones lies with the State. See page 41, supra. The Transit Authority and other subdivisions of the State are merely agents undertaking specific responsibilities. Given the many subdivisions of the State involved in scores of missed milestones, the allegations of the amended Complaint are stated in reasonably "short and plain" form in the Table of Violations incorporated into the pleading. F.R.C.P. §8(a).

In addition to the fact that the Amended Complaint adequately specifies allegations against the Transit Authority, it is also true that the Transit Authority was being brought in not only on account of violations for which it had duties, but because it was a party necessary to grant full relief to preserve

the status quo by preventing the untimely fare increase. This was explained to the District Court in full detail in Plaintiffs' pleadings and memoranda. (A131, A137; Plaintiffs' Memorandum July 20, 1975 at A10-11; Plaintiffs' Answering Memorandum August 1, 1975 at A11-13.)

Thus, even if the District Court correctly found fault in the form of the pleadings, the Court erred in ruling that it "must" dismiss the action as against the Transit Authority. The Court plainly had the power to allow the pleadings to be amended. 2A Moore's, Federal Practice, ¶¶8.02, 8.17[1]. Indeed, amendment or use of other devices under the rules rather than dismissal is the ordinary remedy. Ibid. Dismissal for faulty form in pleadings is disfavored and, in any event, allowed only upon a showing of prejudice. Id. at ¶12.21[2]. Here, the Transit Authority made no claim of prejudice. To take the extraordinary route of dismissal in this case where pleadings, of necessity, had to be drafted on an emergency basis, was an abuse of discretion. But, this Court need not reach this question, since, contrary to the District Court's statements, the Transit Authority is the subject of direct allegations against the "Transit Authority".

CONCLUSION

The District Court's order of August 28, 1975 should be reversed in all respects. The Plaintiffs' motion for preliminary relief should be remanded to the District Court for adjudication with directions as indicated herein. The Amended Complaint as against the Transit Authority should be reinstated and the Transit Authority ordered to serve its answer.

Dated: November 10, 1975
New York, New York

Respectfully submitted,

ROSS SANDLER
DAVID SCHOENBROD
Counsel for Plaintiffs
(Natural Resources Defense Council, Inc.)
Office and P. O. Address
15 West 44th Street
New York, New York 10036
(212) 869-0150

ADDENDUM

EPA REGION II NOTICES OF VIOLATION

INDEX NOS. 50216 and 50217

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II

In the Matter of	NOTICE OF VIOLATION
State of New York (Transportation Control Plan)	Index No. 50216

TO WHOM:

PLEASE TAKE NOTICE that pursuant to Section 113(a)(1) of the Clean Air Act, as amended, 42 U.S.C. §1857c-8 ("the Act"), the Environmental Protection Agency hereby finds that the State of New York is in violation of the Transportation Control portion of the New York City Metropolitan Area Air Quality Implementation Plan. That Plan, developed and submitted by the State of New York, was approved by the Administrator of the Environmental Protection Agency on June 22, 1973 (38 F.R. 16567) for the New York portion of the New Jersey-New York-Connecticut Interstate Air Quality Control Region. The violation cited herein is based upon the failure of the State to implement, effectuate and enforce those control strategies of the Transportation Control Plan as are set forth in the annexed schedule.

PLEASE TAKE FURTHER NOTICE that Section 113(a)(1) of the Act provides that if the violation continues beyond the 30th day after receipt of this Notice, the Regional Administrator of the Environmental Protection Agency may issue an order requiring compliance with the requirements of the Transportation Control Plan or take such other actions as may be authorized by applicable law.

PLEASE TAKE FURTHER NOTICE that in accordance with Section 113(a)(4) of the Act, you have the opportunity for a conference to discuss the violation which is the subject of this Notice. The conference will enable you to present evidence bearing on the finding of violation, on the nature of the violation, and on any efforts you may have taken or propose to take to achieve compliance, including any proposed revisions to the milestones set forth in the Transportation Control Plan. You have a right to be represented by counsel and a transcript will be made of the conference.

A request for a conference, as well as any other inquiries concerning this Notice, should be directed to Thomas F. Harrison, Esq., Chief, General Enforcement Branch, Enforcement and Regional Counsel Division, U.S. Environmental Protection Agency, Region II, telephone number (212) 264-9858, within ten (10) days from receipt of this Notice.

Dated: New York, New York

January 3, 1975

Yours, etc.

Meyer Scolnick
Director
Enforcement and Regional Counsel
Division
U.S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, New York 10007

TO: Honorable Hugh L. Carey
Governor of New York
Albany, New York 12224

cc: Honorable Abraham D. Beame
Mayor of the City of New York

Commissioner Ogden R. Reid
New York State Department of
Environmental Conservation

SCHEDULE OF PRINCIPAL TRANSPORTATION CONTROL STRATEGIES
INCLUDING INCREMENTS OF PROGRESS THAT
SHOULD HAVE BEEN MET ON OR BEFORE DECEMBER 31, 1974

A-2: RETROFIT OF HEAVY DUTY VEHICLES

1. Begin public education effort
2. Obtain final legislative authority to implement program
3. Secure funds for full implementation of program
4. Complete detailed research, development and implementation work plan for entire program
5. Begin training of independent garage mechanics for installation of retrofit devices
6. Complete development and adoption of test standards for all vehicles to be retrofitted
7. Initiate certification of retrofit devices
8. Complete certification of retrofit devices
9. Complete training of independent garage mechanics for installation of retrofit devices
10. Initiate installation of retrofit devices on vehicles registered in the Metropolitan Area
11. Commence enforcement of semi-annual emissions inspection program

A-4: EMISSION INSPECTION OF HEAVY DUTY VEHICLES

1. Obtain final legislative authority to implement program
2. Initiate selection of sites, design of facilities, purchase of land and equipment and construction of facilities
3. Complete detailed research, development and implementation work plan for entire program
4. Secure funds for full implementation of program
5. Adopt heavy duty vehicle test standards
6. Secure capital funding
7. Begin hiring and training emission inspection personnel

A-5: PRIVATE VEHICLE EMISSION INSPECTION

1. Begin [illegible] for full implementation of program
2. Secure funds for full implementation of program
3. Complete detailed research, development and implementation work plan for the entire program
4. Initiate selection of sites for test lanes, design of facilities and purchase of land

5. Initiate purchase of equipment and construction of facilities
6. Begin hiring and training personnel
7. Complete selection of sites, design of facilities, and purchase of land

A-6: MECHANIC TRAINING

1. Initiate efforts to secure required memoranda of understanding
2. Memoranda of understanding secured
3. Begin securing funds for full implementation of program
4. Secure funds for full implementation of program
5. Complete detailed research, development and implementation work plan for the entire program
6. Initiate preparation of educational material and hiring of instructors for the program
7. Begin instructor training
8. Complete development of educational material and hiring of instructors for the program
9. Complete instructor training program
10. Initiate mechanic training under the program
11. Continue training activities on a periodic basis

A-7: INCREASED EXPRESS BUS SERVICE AND PREFERENTIAL LANES

1. Required memoranda of understanding secured
2. Begin securing funds for implementation of the program
3. Secure funds for implementation of the program
4. Begin ordering necessary equipment for implementation of the program
5. Begin implementation of the program
6. Complete ordering necessary equipment

A-8: [illegible] AND EAST AND HARLEM RIVER PROJECTS

1. Initiate effort to secure required memoranda of understanding
2. Required memoranda of understanding secured

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II

In the Matter of	NOTICE OF VIOLATION
City of New York (Transportation Control Plan)	Index No. 50217

SIRS:

PLEASE TAKE NOTICE that pursuant to Section 113(a)(1) of the Clean Air Act, as amended, 42 U.S.C. §1857c-8 ("the Act"), the Environmental Protection Agency hereby finds that the City of New York is in violation of the Transportation Control portion of the New York City Metropolitan Area Air Quality Implementation Plan. That Plan, developed and submitted by the State of New York, was approved by the Administrator of the Environmental Protection Agency on June 12, 1973 (38 F.R. 16567) for the New York portion of the New Jersey-New York-Connecticut Interstate Air Quality Control Region. The violation cited herein is based upon the failure of the City to implement, effectuate and enforce those control strategies of the Transportation Control Plan as are set forth in the annexed schedule.

PLEASE TAKE FURTHER NOTICE that Section 113(a)(1) of the Act provides that if the violation continues beyond the 30th day after receipt of this Notice, the Regional Administrator of the Environmental Protection Agency may issue an order requiring compliance with the requirements of the Transportation Control Plan or take such other actions as may be authorized by said Section.

PLEASE TAKE FURTHER NOTICE that in accordance with Section 113(a)(4) of the Act, you have the opportunity for a conference to discuss the violation with [illegible] of this Notice. The conference will enable you [illegible] bearing on the finding of violation, on the amount of time which may be [illegible] efforts you may have taken or propose to take to achieve compliance, including any proposed revisions to the milestones set forth in the Transportation Control Plan. You have a right to be represented by counsel and a transcript will be made of the conference.

A request for a conference, as well as any other inquiries concerning this Notice, should be directed to Thomas F. Harrison, Esq., Chief, General Enforcement Branch, Enforcement and Regional Counsel Division, U.S. Environmental Protection Agency, Region II, telephone number (212) 264-9858, within ten (10) days from receipt of this Notice.

Dated: New York, New York

January 9, 1975

Yours, etc.

Meyer Sedlick
Director
Enforcement and Regional Counsel
Division
U.S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, New York 10007

TO: Honorable Abraham D. Beame
Mayor of the City of New York
New York, New York 10007

cc: Honorable Hugh L. Carey
Governor of New York

Administrator Robert A. Low
Environmental Protection Administration

[illegible] FUNCTIONAL TRANSPORTATION CONTROL STRATEGIES
INCLUDING INCREMENTAL C[illegible] PROGRESS UNIT
SHOULD HAVE BEEN MET ON OR BEFORE DECEMBER 31, 1974
(Strategies Developed and Submitted by the State of New York)

A-2: RETROFIT OF HEAVY DUTY VEHICLES

1. Begin public education effort
2. Complete development and refinement of retrofit control equipment
3. Begin training of independent garage mechanics for installation of retrofit devices
4. Complete development and adoption of test standards for all vehicles to be retrofitted
5. Initiate certification of retrofit devices
6. Complete certification of retrofit devices
7. Complete training of independent garage mechanics for installation of retrofit devices
8. Initiate installation of retrofit devices on vehicles registered in the Metropolitan Area

A-4: TRI-ANNUAL EMISSION INSPECTION OF ALL LIVERY VEHICLES

1. Begin establishing inventory monitoring and scheduling system
2. Secure funding for full implementation of program
3. Complete setting up facility and checkout equipment
4. Initiate full scale tri-annual inspection program
5. Complete inventory monitoring and scheduling system
6. Initiate periodic surveillance program

A-5: EMISSION INSPECTION OF HEAVY DUTY VEHICLES

1. Further define and evaluate heavy duty vehicle population and urban operating characteristics
2. Complete development of emission inspection procedures for heavy duty vehicles
3. Initiate development of heavy duty vehicle test standards

A-[illegible]: [illegible] OF TRAFFIC AND PARKING REGULATIONS

1. Begin preparation of detailed research, development and implementation work plan for the entire program
2. [illegible] for full implementation of the program
3. Complete detailed research, development and implementation work plan
4. Initiate evaluation of adequacy of existing regulations
5. Complete evaluation of existing regulations

6. Initiate analysis of the impact of each regulation
7. Complete impact analysis on each regulation
8. Initiate development and adoption of new regulations
9. Initiate development of detailed implementation plan
10. Development and adoption of new regulations completed
11. Begin securing funds for hiring para-professional staff
12. Development of detailed implementation work plan completed
13. Secure funds to support para-professional staff
14. Initiate design, organization and training of para-professional enforcement staff
15. Initiate strategy implementation
16. Begin phasing in para-professional staff

Traffic Management

1. Initiate efforts to secure required memoranda of understanding
2. Memoranda of understanding secured
3. Begin preparation of detailed research, development and implementation work plan
4. Begin securing funds for full implementation of program
5. Complete detailed research, development and implementation work plan
6. Begin securing funds for development of traffic control master plan
7. Secure funds for development of traffic control master plan
8. Begin development and adoption of traffic control master plan

Effective Ban on Taxi Cruising

1. Initiate efforts to secure required memoranda of understanding
2. Memoranda of understanding secured
3. Begin preparation of detailed research, development and implementation work plan
4. Begin securing funds for full implementation of program
5. Complete detailed research, development and implementation work plan
6. Secure funds for research, development and implementation work plan

7. Begin evaluation of theoretical impact of program
8. Complete air quality data collection and identification of high pollution streets in Midtown and Downtown Manhattan
9. Secure funds for implementation of program
10. Begin establishment of enforcement procedures
11. Initiate ban on selected streets in Midtown and Downtown Manhattan
12. Start expansion of ban to other streets in Midtown and Downtown Manhattan
13. Complete establishment of enforcement procedures
14. Complete initiation of cruising ban on streets in Midtown and Downtown Manhattan

[illegible] REDUCTION OF PARKING SPACE IN MANHATTAN CBD

1. Required memoranda of understanding secured
2. Begin securing funds for development of Central Business District (CBD) and citywide parking policy
3. Secure funds for policy development
4. Complete development and adoption of CBD parking policy
5. Begin securing funds for implementation of CBD parking policy
6. Start selection of off-street parking facilities to be discontinued
7. Secure funds for implementation of CBD parking policy
8. Complete development and adoption of citywide parking policy
9. Complete selection of off-street parking facilities to be discontinued
10. Begin purchasing and closing selected facilities
11. Begin securing funds for implementation of citywide parking policy
12. Secure funds for implementation of citywide parking policy
13. Begin implementation of citywide parking policy

[illegible] TRAFFIC SIGNAL AND MONITORING IMPROVEMENTS

1. Complete development of traffic plans for program
2. Begin securing funds for implementation of program
3. Submit for implementation of the program
4. Begin securing necessary equipment for implementation of the program
5. Begin implementation of the program
6. Complete procuring necessary equipment

B. Tasks: INSTALL TOLLS ON ALL EAST AND HALIFAX RIVER BRIDGES

1. Begin preparation of detailed research, development and implementation work plan
2. Complete detailed research, development and implementation work plan
3. Begin securing all necessary study and design funds
4. All necessary study and design funds secured
5. Begin preparation of alternative traffic plans for Modification
6. Begin evaluation of conditions prior to institution of tolls
7. Start securing funds to install toll booths
8. Complete analysis of conditions prior to toll implementation
9. Funds to install toll booths secured
10. Start modification of bridge facilities

C. Tasks: ROUND-THE-HOUSE GOODS DELIVERY

1. Initiate effort to secure memoranda of understanding
2. Memoranda of understanding secured
3. Start development of detailed work plan for full implementation of program
4. Complete preparation of detailed work plan for implementation

AFFIDAVIT OF SERVICE BY MAIL

State of New York
County of Kings

Stephen Zedalis, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 47-19 194th Street Flushing, N.Y.

That on the 13th day of November, 1975, deponent served the within Brief for Plaintiff-Appellants upon Hon. Louis J. Lefkowitz, Attorney General of the State of New York Two World Trade Center, New York, N.Y. 10047
Hon. W. Bernard Richland, Corporation Counsel, New York City Municipal Building, N.Y. N.Y. 10007
Stuart Riedel, Esq. General Counsel, N.Y.C.T.A. 370 Jay Street, Brooklyn, N.Y. 11201

Attorney(s) for the Appellees in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Stephen Zedalis

Sworn to before me, Sean J. Fay.

This 13th day of November 1975

SEAN J. FAY
Notary Public, State of New York
No. 24-4612261
Qualified in Kings County
Commission Expires March 30, 1977